UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

INTERNATIONAL BROTHERHOOD OF TEAMSTERS,

Charging Party, **Case Nos. 21-CA-150873**
21-CA-164483
and **21-CA-175414**
21-CA-192602

XPO CARTAGE, INC.,

Respondent.

RESPONDENT XPO CARTAGE, INC.'S RESPONSE TO NOTICE TO SHOW CAUSE

Respondent XPO Cartage, Inc. (XPO) hereby responds to the National Labor Relations Board's (Board) March 26, 2019 Notice to Show Cause.

As demonstrated below, remand is not necessary in this case because the Board's decision in *SuperShuttle DFW, Inc.*, 367 N.L.R.B. No. 75 (2019) (*SuperShuttle*) raises no new factual considerations and can be applied here using the record developed in this case. Where a decision does not require any further development of the record, "[t]he Board itself can apply the relevant law to the established facts, without the additional delay inherent in a remand." *Pac. Coast M.S. Indus. Co., Ltd.*, 355 N.L.R.B. 1422, 1428 n.14 (2010).

This case is particularly appropriate for a Board determination because *SuperShuttle* presents nothing new to the litigants. *SuperShuttle* retained the Board's ten-factor test while adjusting the analysis of those factors to conform with pre-existing Circuit Court law. *See SuperShuttle* at 11. The result is that this case is before the Board on a factual record completely consistent with the principles announced in *SuperShuttle,* exhaustively developed during a

thirteen-day hearing. As such, remand is unnecessary and would serve only to delay resolution of the case.

I. ARGUMENT

A. Background

1. Summary of Proceedings

This case involves several unfair labor practice allegations against XPO which turn, in the first instance, on whether XPO properly classified as independent contractors the Owner-Operator drivers that haul freight for XPO's customers in Southern California. The International Brotherhood of Teamsters (Union) filed the initial charge in the case on April 24, 2015 – almost four years ago. The General Counsel eventually issued a consolidated complaint, leading to a thirteen-day hearing before ALJ Christine E. Dibble in July, August and September of 2017.

On September 12, 2018, ALJ Dibble issued her decision finding that XPO violated the National Labor Relations Act on two of thirteen allegations in the complaint; severing and deferring consideration of one of the allegations; and dismissing the remaining ten allegations. As a threshold matter in the case, ALJ Dibble found that the XPO Owner-Operators were employees rather than independent contractors.

ALJ Dibble explicitly grounded her analysis of the independent contractor issue, both generally and on the subject of entrepreneurial opportunity, on the Board's decision in *FedEx Home Delivery*, 361 N.L.R.B. 610 (2014) (*FedEx*). *See* ALJ Decision at 13, 22-23. Both XPO and the Counsel for the General Counsel subsequently and timely filed exceptions to the ALJ's decision. In its exceptions, XPO specifically excepted to the ALJ's finding that the Owner-Operators were employees and not independent contractors. As of January 4, 2019, the exceptions were fully briefed and awaiting decision by the Board.

2. *SuperShuttle*

On January 25, 2019, the Board issued its decision in *SuperShuttle*. While retaining the Board's traditional ten-factor test for determining independent contractor status, *SuperShuttle* overruled how the Board in *FedEx* required those factors to be evaluated and weighed. Specifically, *SuperShuttle* found "[e]ntrepreneurial opportunity, like employer control, is a principle by which to evaluate the overall effect of the common-law factors on a putative contractor's independence to pursue economic gain." *SuperShuttle* at 9. Accordingly, "the Board may evaluate the common-law factors through the prism of entrepreneurial opportunity when the specific factual circumstances of the case make such an evaluation appropriate." *Id.* The Board also found that the rejected *FedEx* approach improperly had "selectively overemphasize[d] the significance of 'right to control factors' relevant to perceived economic dependency . . . ." *Id.*

Ultimately, *SuperShuttle* resolved the disagreement between the Board and the Circuit Courts as to the proper legal analysis used to evaluate the common law factors relevant to the independent contractor analysis. *See FedEx Home Delivery*, 351 N.L.R.B. No. 16 (2007) *vacated, FedEx Home Delivery v. NLRB*, 563 F.3d 492 (D.C. Cir. 2009); *FedEx Home Delivery*, 361 N.L.R.B. 610 (2014) *vacated, FedEx Home Delivery v. NLRB*, 849 F.3d 1123 (D.C. Cir. 2017). What it did not do was change those common law factors. As a result, *SuperShuttle* did not disturb the adequacy of the factual record developed in this case regarding those common law factors.

B. Remand is Unnecessary Because *SuperShuttle* Does not Disturb the Relevance of the Factual Record in This Case

Remand is unnecessary when the reviewing body need apply the law to a complete factual record. In *Pacific Coast M.S. Industries Co.*, 355 N.L.R.B. 1422 (2010), the Board rejected a request to remand for further proceedings to account for a change in Board law on the

grounds that "[t]he Board itself can apply the relevant law to the established facts, without the additional delay inherent in a remand." *Pac. Coast M.S. Indus. Co., Ltd*., 355 N.L.R.B. at 1428 n.14; *see also Armstrong v. Collier*, 536 F.2d 72, 77 (5th Cir. 1976) ("remand is not required if a complete understanding of the issues may be had without the aid of separate findings"). Applying the law to a fully developed record is a function that the Board has performed frequently, not only in *SuperShuttle*, but also in other independent contractor cases. *See, e.g.*, *SuperShuttle, Dial-a-Mattress Operating Corp*., 326 N.L.R.B. 884 (1998); *Arizona Republic*, 349 N.L.R.B. 1040 (2007).

So too, remand is unnecessary and inappropriate in this case. The record here is not missing any particular factual finding necessitating either further proceedings to apply *SuperShuttle* to the facts of this case or a reopening of the record. The parties fully developed the facts relating to the still applicable ten-factor test applied by the Board before and after *SuperShuttle*. The extensive attention given by the parties to factors relating to entrepreneurial opportunity and the right to control is amply recorded in the posthearing briefs filed by the parties. *See* XPO Posthearing Br. at 82-103, attached as Exh. A, Counsel for the General Counsel's Posthearing Br. at 89-94, attached as Exh. B.[1]

Nor is there anything novel in *SuperShuttle*'s holding that make this case benefit from a remand. *SuperShuttle* simply eliminated a disagreement between the Board and the Circuit Courts by adopting the pre-existing view of the D.C. Circuit. *See SuperShuttle* at 11 (citing *FedEx Home Delivery v. NLRB*, 563 F.3d 492 (D.C. Cir. 2009)). As a result, *SuperShuttle* presents only the purely legal issue of how to evaluate the fully developed facts of this case.

[1] It is further confirmed by the ALJ's decision, which made explicit findings relating to entrepreneurship, albeit under the Board's now-defunct *FedEx* analysis. ALJ Decision at 22-23.

Notably, XPO anticipated the holding of the *SuperShuttle* decision, maintaining throughout these proceedings that the D.C. Circuit's analysis in *FedEx Home Delivery v. NLRB*, 563 F.3d 492 (D.C. Cir. 2009) – accepted by the Board in *SuperShuttle* – provided the proper framework for assessing the independent entrepreneurial nature of the Owner-Operator drivers' businesses. XPO Brief ISO Exceptions (XPO Exceptions Br.) at 2 n.1, 17-18, 20; XPO Posthearing Br., Exh. A., at 103-105. XPO specifically demonstrated that ALJ Dibble had engaged in the selective emphasis of factors that the Board rejected in *SuperShuttle*. *See SuperShuttle* at 7; XPO Exceptions Br. at 31. Review of the completely developed factual record and legal arguments in order to properly weight these factors is a task that falls well within the Board's traditional function of deciding exceptions to an ALJ decision.

On the other hand, a remand to the ALJ would only serve to waste the Board and parties' resources. Given that the thirteen-day hearing focused on developing a record of the exact same common law factors evaluated in *SuperShuttle*, a remand and reopening of the record would not add anything but duplicative and cumulative evidence. This additional delay would deny the employer certainty on an issue critical to obtaining clarity to matters of great significance to its ongoing operations. All told, a remand will impose these burdens simply to get this matter to the procedural point where it currently sits – awaiting the Board's review on the existing factual record.

The Board should avoid the "additional delay inherent in a remand" because this case requires little more than a straightforward application of *SuperShuttle* to the existing record.

C. Application of *SuperShuttle* to the Facts of this Case Does not Require Remand

Even a cursory review of the record demonstrates that the Board can readily apply *SuperShuttle* to this case without a remand. The factors that led the Board to conclude that the

SuperShuttle drivers were independent contractors are mirrored almost precisely in this case and, to a large extent, even in the ALJ's findings:

- the drivers are entrepreneurial economic actors that make "calculated choices between which trips to choose," affecting the individual drivers' profit margins, and ultimately resulting in not all drivers achieving the same profits, *compare SuperShuttle* at 7 *with* XPO Exceptions Br. at 11-12;

- the freedom from control in most significant respects in the day-to-day performance of the drivers' work, including when and where to work and discretion over whether to accept a particular fare/load, *compare SuperShuttle* at 12 *with* XPO Exceptions Br. at 10-13;

- the limited contact between the company and the drivers, mostly conducted through an electronic dispatch system notifying drivers of available assignments, *compare SuperShuttle* at 12 *with* XPO Exceptions Br. at 12;

- the drivers' ability to hire additional drivers, allowing the owner the ability to earn more revenue, *compare SuperShuttle* at 7 *with* XPO Exceptions Br. at 10;

- the significant investment by the driver in his or her vehicle, *compare SuperShuttle* at 13 *with* XPO Exceptions Br. at 8;

- the drivers' responsibility for the cost of gas, tolls, and vehicle maintenance, *compare SuperShuttle* at 13 *with* XPO Exceptions Br. at 9;

- the lack of supervision by the company, *compare SuperShuttle* at 13-14 *with* XPO Exceptions Br. at 6-7;

- a written agreement between the company and the driver indicating an intention to create an independent contractor relationship, *compare SuperShuttle* at 14 *with* XPO Exceptions Br. at 8;

- the lack of employee benefits provided to the drivers, *compare SuperShuttle* at 14 *with* XPO Exceptions Br. at 13-14; and

- that many drivers incorporated their independent business, *compare SuperShuttle* at 14 *with* ALJ Decision at 22.

Even the differences between this case and *SuperShuttle* demonstrate that a remand would serve no useful purpose, as the record here presents an even stronger case for independent contractor status:

- The XPO drivers' tractors cost $100,000+ as opposed to the $30,000 invested by SuperShuttle drivers. *Compare SuperShuttle* at 4 *with* XPO Exceptions Br. at 8.

- Unlike SuperShuttle drivers, the record here establishes that drivers for XPO may and do grow their business by operating multiple vehicles. *Compare SuperShuttle* at 7 *with* XPO Exceptions Br. at 9.

- SuperShuttle had far more involvement in the details of the drivers work including providing mandatory driver training, enforcing a dress code, retaining the right to impose a disciplinary system; and dictating the overall appearance of the drivers' vehicle. *SuperShuttle* at 4, 6. These indicia of employer control are absent in the XPO case. XPO Exceptions Br. at 13.

- *SuperShuttle* demonstrates that the contact with customers should not have been given the determinative weight it was given by ALJ Dibble in the this case – the *SuperShuttle* drivers were found to be contractors even though they "play no role in soliciting passengers and arranging pickups" and do not set the fares charged to the customers. *Compare SuperShuttle* at 5, 7, 12-14 *with* XPO Exceptions Br. at 6, 8-14.

- The Board also rejected a "strictly quantitative" scorecard approach to the common law analytical factors, another error that XPO specifically identified in its exceptions. *Compare SuperShuttle* at 8, 11 *with* XPO Exceptions Br. at 18. The Board held that the independent contractor inquiry instead called for a qualitative evaluation of the factors as to whether the factors revealed a significant opportunity for gain or risk of loss. *SuperShuttle* at 11.

Ultimately, *SuperShuttle* makes clear that ALJ Dibble's conclusion cannot stand, even on the facts as she found them to be. The Board should correct this error by retaining this case and applying the *SuperShuttle* analysis to the existing factual record.

II. CONCLUSION

For the foregoing reasons, the Board should not remand this case to the Administrative Law Judge. The Board should instead decide the case on the existing record and the exceptions briefing already submitted by the parties.

Respectfully Submitted,

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Dated: April 9, 2019

CERTIFICATE OF SERVICE

I hereby certify this 9th day of April, 2019, that a copy of Respondent XPO Cartage's Response to Notice to Show Cause was electronically filed through the Board's electronic filing system, and also served on the following by email:

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Division of Judges

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, Charging Party, and XPO CARTAGE, INC. Employer.	Case Nos. 21-CA-150873 21-CA-164483 21-CA-175414 21-CA-192602

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Furthermore, Second-Seat Drivers *have* to negotiate individual payment plans with their Owner-Operators, and XPO is not involved in this process; this results in a variety of different payment plans. *See infra*, III(I)(3).

7. The Drivers Do Not Receive Minimum-Pay Guarantees Or Subsidies.

Significantly, the Drivers do not receive any guarantees as to amount of payment or work. GC Exh. 60 at Section 12; GC Exh. 57 at Section 2(A); Montenegro 1468. This evidences that the Drivers are paid like independent contractors. *Dial-A-Mattress*, 326 NLRB at 891-92.[47]

This is markedly different from *FedEx*. In *FedEx*, FedEx insulated drivers against loss by guaranteeing them payment simply for showing up each day, subsidizing drivers in "emerging routes" by compensating them for a "normal level of packages and deliveries," and granting additional compensation to drivers if customers were taken off their routes. 361 NLRB at 623; *see also Roadway*, 326 NLRB at 852-53 (drivers guaranteed payments simply for making their vans available and received supplemental subsidy payments until reached "normal range of pickups and deliveries…irrespective of the driver's personal initiative and effort") (internal quotations omitted).

I. The Drivers Operate As Independent Businesses.

1. The Drivers Decide Their Own Schedules, Vacation Times, And Work Times.

A worker's ability to control "scheduling of performance" tends to indicate that the worker is functioning as an independent business. *FedEx*, 361 NLRB at 621 ("The independent-business factor encompasses…whether the putative contractor…has control over important

[47] The Drivers receive a fuel surcharge when the price of fuel surpasses a preset average. However, as recognized by the Board, "[s]uch payments are common in the trucking industry" and do not alter the conclusion that these drivers are compensated like independent contractors. *Argix Direct*, 343 NLRB at 1019, 1021.

decisions, such as the scheduling of performance."); *see also Porter Drywall,* 362 NLRB No. 6, slip op. at 3, 5 (workers ability to "set their own hours and the hours of their crew" — even though "within the hours set by the general contractor" — evidenced they were operating as independent businesses).

As already briefed at length, the Drivers have a wide range of discretion over the scheduling of their performance, including discretion regarding how many days they will work, what days they will work, their start and end times, when they will vacation, and how long they will work on a particular day. This is in stark contrast to *FedEx*, wherein FedEx required that drivers' vehicles be put to use Tuesday through Saturday, FedEx determined how many packages had to be delivered and stops made on a particular day, and all deliveries had to be made on the same day and by 8:00 p.m. *FedEx*, 361 NLRB at 621-22, 624.

The Drivers' control over their schedules is doubly significant under the independent-business factor. Not only does it evidence control over important decisions, but it also allows for entrepreneurial opportunity. The Drivers testified that the time of day in which they chose to drive had a tangible and significant impact on their income. When Davis started driving for XPO, for example, he experimented with six different delivery times, including "very early morning, late morning, early afternoon, early evening, [and] late at night" before deciding that he would choose to drive primarily "very early in the morning or very late at night." 1801-02. Davis testified that he prefers these times because they allow him to earn money more efficiently, because traffic was the lightest at these times and dispatch tended to be quicker. *Id.* Decoud similarly testified that by being strategic regarding the hours at which he drives, he not only gets more done "in offbeat traffic hours," but he saves on fuel costs,[48] which has a

[48] Decoud testified that fueling these trucks constitutes his greatest expense. 1594-95.

significant impact on his profits. 1595-96. The Board finds this to constitute indicia of independent-contractor status. *Austin Tupler Trucking*, 261 NLRB at 185 (finding truck drivers to be independent contractors where they could "affect their profit and loss by varying the amount *and timing* of their driving") (emphasis added).

2. The Drivers Assess For Themselves Whether To Accept Work That Is Offered, Based On A Wide Variety of Business Considerations.

The Drivers also exercise significant discretion with regard to the work they choose to perform for XPO. This is in stark contrast to *FedEx*, wherein FedEx assigned drivers specific routes and determined the number of packages to be delivered, and FedEx would not allow drivers to reject deliveries assigned to them. *FedEx*, 361 NLRB at 615.

The facts here are more analogous to *Porter Drywall*. In *Porter Drywall*, the Board found the independent-business factor to sway in favor of independent-contractor status where the workers had to decide for themselves whether accepting work on a particular job would be in their financial interest. 362 NLRB No. 6 slip op. at 5. The same holds true here.

The Drivers clearly testified that in deciding what loads to accept, they take profitability into account. *See*, *e.g.*, Lopez 565: Q: "Now have you ever told the dispatcher after you received an assignment that you didn't want to do that assignment?" A: "There are times, yes, because they don't pay well for that movement;" Ackling 1542-45; Decoud 1584 -1586, 1594-96.

Rodriguez, a dispatcher, explained that Drivers reject deliveries for a variety of reasons, including if they believe the delivery is too far, if the load is too heavy (which would burn more fuel and cost more money), or if the particular customer or location (such as the Ports) has a reputation for wasting the Drivers' time. 1642-46. Indeed, some Drivers will only deliver for a particular customer of their preference. Rodriguez 1651. As set forth in the previous section,

several of the Drivers testified that they strategically choose to accept loads at obscure hours in order to avoid traffic and maximize efficiency.[49]

Drivers clearly make strategic choices regarding the work they accept from XPO, which augurs in favor of independent-contractor status.

3. The Owner-Operators Have To Make Significant Personnel Decisions, Including Whether To Hire Others, And Under What Terms.

a. The Owner-Operators All Actively Decide Whether To Hire Other Drivers, And Many Do Hire Other Drivers.

The Owner-Operators all actively consider whether to hire drivers of their own, and many exercise that uncontroverted right. The ability to hire drivers is an entrepreneurial characteristic of highly significant import. *FedEx*, 361 NLRB at 624 ("drivers' right to hire and supervise supplemental drivers…is indicative of independent contractor status"); *see also FedEx Home Delivery v. N.L.R.B.*, 563 F.3d 492, 499 (D.C. Cir. 2009) ("This ability to hire 'others to do the Company's work' is no small thing in evaluating 'entrepreneurial opportunity.'"); *Merchants Home Delivery*, 580 F.2d at 974–75 ("[T]he entrepreneurial characteristics of the owner-operators tip decidedly in favor of independent contractor status. …[A]ll have the right to employ their own helpers to assist them in making deliveries, and several do so"); *Porter Drywall,* 362 NLRB No. 6, slip op. at 5 (crew leaders rendered services as independent businesses where they had to calculate "whether to hire other individuals to work for them").

The majority of Drivers who testified at the hearing had direct experience regarding this significant entrepreneurial opportunity.

- While operating as an Owner-Operator, Avalos hired a Driver of his own for two weeks while Avalos took a vacation. 401. Avalos also testified to his extensive experience

[49] Trauner echoed that drivers "willing to take some of the less desirable loads" [e.g., driving well past midnight, like Ackling and Decoud] tend to see favorable returns in their compensation. 1959-60.

driving for other Owner-Operators. *See*, *e.g.*, 253-54, 350, 386-387, 467-68. Avalos personally negotiates his agreements and pay rates with these Owner-Operators. 253-54, 384, 384. XPO was not involved in the negotiations between Avalos and the various Owner-Operators he has driven for. *Id.*

- Canales has driven as a Second-Seat Driver for at least one other Owner-Operator. 762. He personally reached a work and pay agreement with the Owner-Operator. 895. As an Owner-Operator, Canales also hired his own Second-Seat Driver for three months at the end of 2015, with whom Canales reached his own work and pay arrangement. 904-06.
- Jose Solis testified to having two current Second-Seat Drivers, whom he personally finds without XPO's help. 2071, 2076.
- Gaitan testified to having driven for five different Owner-Operators while performing services for XPO or Pacer. 642. At one time, he drove for Domingo Avalos. 716-17.
- Lopez testified to having hired his own Second-Seat Driver, with whom he personally negotiated an agreement. 620-21.
- Montenegro has hired numerous Second-Seat Drivers while working for XPO and Pacer. 1452-53. He invests in advertisements in the Los Angeles Times and at truck stops to find driver candidates, whom he interviews and selects himself. 1452-53. Montenegro forms different kinds of agreements with different Second-Seat Drivers. 1454-55. Montenegro confirmed he can terminate his relationship with a Second-Seat Driver without XPO's permission. 1455.
- Davis began performing services for XPO as a Second-Seat Driver for an Owner-Operator, with whom he reached a work agreement without XPO's involvement. 1766-68. Today, Davis has four Second-Seat Drivers driving for him, and he has had 10-12 in

total while driving for XPO. 1775. Davis reaches his own agreements with his Second-Seat Drivers, and offers a variety of unique payment and bonus options. 1784-87. Davis' business strategy is to have two drivers assigned to a truck at a time, in order to maximize revenue. 1794-95. The model has been successful for Davis, and he plans to "lather and repeat" moving forward. 1792.

The other Owner-Operators did not contest that they have the clear right to hire drivers and workers of their own; but for their own business reasons, they have chosen not to exercise the right to hire.

- Gaitan testified that he did not want to hire a driver because he would have concerns about the driver's ability to care for his equipment. 724-25.
- Herrera similarly testified that, for business reasons, he does not want to hire a driver out of concern for the maintenance of his equipment. 217-18.
- Ackling repeated this theme, testifying that he has not yet hired a driver because he has "never met anybody [he] trusted to drive [his] truck." 1555.

This ability to hire Drivers is actual and not theoretical. Moreover, it is relevant that the Owner-Operators here have the free choice to decide for themselves whether it is a prudent business decision, for them, to hire another driver. In *Dial-A-Mattress*, in contrast, drivers were compelled by the company to hire helpers. *Dial-A-Mattress*, 326 NLRB at 895. Moreover, unlike in *FedEx*, *Dial-A-Mattress*, and *Roadway*, the Drivers do not need to hire replacement workers when they want to take time off. *See supra*, III(D)(1).

b. Owner-Operators Dictate The Terms And Conditions Of Second-Seat Drivers' Engagements.

Owner-Operators maintain great latitude to dictate their relationships with their Second-Seat Drivers. The ICOC provides, for example:

> Contractor will be solely responsible for the selection, direction and supervision, training, disciplining, firing, and other aspects of control of Contractor's drivers, employees, agents or servants, including their wages, hours, and working conditions. Contractor will determine the method, means, and manner of performing under this Contract… GC Exh.60 at Section 11.

See also GC Exh. 57 (ICHA) at Section 3 ("Contractor's Personnel"). The testimony was clear that Owner-Operators and Second-Seat Drivers decide between themselves when the Second-Seat Driver will work,[50] what and how the Second-Seat Driver will be paid, and if the Owner-Operator will terminate his relationship with the Second-Seat Driver.[51] This presents significant entrepreneurial opportunity for both the Owner-Operator and the Second-Seat Driver, and demonstrates "control over important business decisions" within the meaning of the independent-business factor. *FedEx*, 361 NLRB at 621 ("The independent-business factor encompasses …whether the putative contractor…has control over important business decisions, such as the scheduling of performance; the hiring, selection, and assignment of employees.").

Both Davis and Montenegro testified to offering specialized pay packages to their Second-Seat Drivers, which are designed to incentivize their Drivers to generate more money and deliver over extended periods of time. Montenegro 1454-55; Davis 1786-87. For example, Davis offers a signing bonus that is spread out over time, in an effort to retain talent, and he offers additional pay to Second-Seat Drivers who complete higher-paying HazMat deliveries; Montenegro pays his Drivers a higher percentage of the revenue earned off his trucks if the Driver generates certain levels of income. *Id.*

[50] Gaitan 643.
[51] Montenegro 1455.

Montenegro and Davis also testified that they strive to ensure that someone is driving their trucks at all hours of the day to maximize revenue. Davis 1794-95; Montenegro 1489. *See Central Transport*, 299 NLRB at 13 ("The drivers could also enhance their income, like Callahan, by hiring another driver to perform evening work, or like Bryant, to add another tractor or hire another driver to do weekend work. These are indicia of entrepreneurial status"). Del Campo has even observed three Drivers splitting a single truck during a certain period of time. 1698. In contrast, Owner-Operators who operate with one Driver per truck are limited in the revenue they can generate by the DOT hours-of-service limitations. Trauner 1959-60.

Second-Seat Drivers also exercise the ability to negotiate higher rates from Owner-Operators. For example, Canales paid his Second-Seat Driver 40% of the money earned off his truck. 904-905. Avalos similarly was paid 40% while driving for Alva; but he then negotiated to be paid 45% from both Ruiz and Magana. 384, 391-92. XPO does not contract with Second-Seat Drivers or dictate their hours or pay. Trauner 1952. Indeed, since XPO does not dictate what Owner-Operators pay their Second-Seat Drivers, there is a range in the Second-Seat Drivers' payment terms. Davis 1784-85.

c. The Owner-Operators' Personnel Decisions Dictate Whether They Will Drive At All During Certain Periods Of Time.

Significantly, numerous Owner-Operators choose not to drive *at all* — or to drive only sparsely — dependent upon how many Second-Seat Drivers they currently have in their fleet. Avalos 467; Del Campo 1699-1700; Trauner 1952-53. Davis, for example, does not drive as much as he used to, since he has built up the number of Drivers in his fleet. 1789. Generally, if he has three or less Drivers at one time, Davis will tend to drive more frequently; but if he has four or more Drivers, he dedicates as much time as possible to managing paperwork and his trucks, letting his Second-Seat Drivers handle the bulk of the driving. 1789-1790. This is all

further indicia of entrepreneurial activity that was not in dispute at the hearing. *Argix Direct*, 343 NLRB at 1020 (finding significant that some of the drivers drove their trucks, while others elected not to); *Dial-A-Mattress*, 326 NLRB at 893 ("Significantly, several owner-operators use more than one delivery vehicle and employ at least one driver as well as helpers, and at least three owner-operators do not even drive but operate solely as entrepreneurs.").

4. The Drivers All Have A Realistic Ability To Work For Others.

The Drivers all have a realistic opportunity to work for other companies and the record evidence established that several Drivers have simultaneously driven for XPO and other companies in the recent past. The ability to exercise this right is provided for throughout the ICOCs. *See*:

> Contractor may operate the Vehicle for alternative uses…Except as restricted by Applicable Law (including 49 CFR Part 376), nothing in this Contract will prohibit Contractor from performing transportation services for other carriers, brokers or directly for shippers. GC Exh. 60 at Section 4(C).

See also:

> Contractor is not prohibited from entering into separate agreements to provide equipment and other professional truck drivers…to other motor carriers. Nor is Contractor, consistent with Article 4(C) and Schedule T of this Contract, prohibited from using Contractor's Vehicles for the pickup, transportation, or delivery of property for more than one motor carrier or any other person or entity."

GC Exh. 60 at Section 12. *No one* disputed that Drivers have the ability to simultaneously operate separate vehicles — other than the one legally required to be leased to XPO — for other companies, or that Drivers could provide any other sort of services they want for other companies at any time. Indeed, uncontroverted evidence established that several Drivers have, within the past couple years, simultaneously provided delivery services for XPO and another company: (1) Marco Ruiz (Avalos 464-465; Del Campo, 1700; Trauner, 1983-84); (2) Henry Corrales (Del Campo, 1700); and (3) William DeCosta (Trauner, 1983-84, 2029-30).

Montenegro and Davis also testified that they have recently considered moving their operations — or at least part of their operations — to different companies, and acknowledge that they have the ability to do so. Montenegro 1455-56; Davis 1779-80, 1803.

The facts here are in contrast to *FedEx*, where there was apparently no evidence of a driver working for another company, and where "[a]s a practical matter, drivers' work commitment to FedEx—typically from 6 a.m. to 8 p.m. from Tuesday through Saturday [as *required* by the company]—occupie[d] the time when most other commercial opportunities would be available." *FedEx*, 361 NLRB at 624 (brackets added). This is also unlike the situation in *Time Auto Transp*., in which drivers were flatly prohibited from driving for other companies, and were required to generate a certain amount of monthly income, which required drivers to max out their DOT-permitted hours with the company. 338 NLRB at 638. The facts are also distinguishable from *Roadway*, wherein drivers were flatly prohibited from conducting outside business during the day, and had to return their trucks to the company's terminal each night. 326 NLRB at 851.

The facts here are much closer to — and even more indicative of independent-contractor status than — *Dial-A-Mattress*, where the Board expressly found that the drivers were "free to work for other companies and use their trucks for personal business," despite the fact that (a) the drivers were prohibited from working for competitor companies,[52] (b) "virtually all" of them exclusively serviced the company, and the two who serviced other companies still spent 90-95% of their time working for Dial; (c) the drivers' trucks were required to be scheduled to perform services six days per week for Dial, and the average driver worked 10 to 14 hours per day for Dial; and (d) there was testimony that a driver was suspended for turning work down. *Dial-A-*

[52] The Drivers here are permitted to work for direct competitors. Trauner 1983-84; Decoud 1592.

Mattress, 326 NLRB at 885, 887, 889, 893, 895. Despite the fact that few drivers took advantage of the opportunity to work for other companies, the Board in *Dial* clearly found they had the actual (not theoretical) opportunity to do so, which is the essential inquiry. *Id.* at 893.[53] *See also Menard*, 2017 WL 5564295 (because six drivers across 300 of the putative employer's stores had worked for other clients, there was an actual entrepreneurial opportunity to work for other companies, "regardless of whether other contractors exploit that opportunity.").

Again, it was undisputed that Drivers did in fact have the opportunity to work for other companies while simultaneously working for XPO. Some of the counsel for General Counsel's Owner-Operator witnesses at the hearing appear, instead, to contest their ability to use the trucks they lease to XPO for simultaneous outside business pursuits. This argument is flawed on several levels. As explained at length above, Owner-Operators have the contractual right to do this. *See*, *e.g.*, GC Exh. 60 at Sections 4(C), 12. XPO's management witnesses also confirmed that Drivers in practice are free to take the trucks that are legally required to be leased to XPO, and "trip lease," *i.e.*, make deliveries under the authority of other motor carriers. Camacho 1137-38; Maleski 1866; Trauner 1985. Flores has even advised Drivers on how they can accomplish this while ensuring compliance with applicable laws. 1315-16, 1358. Indeed, the ICOC explains exactly how trip leasing can be accomplished. GC Exh. 60 at Schedule T. Decoud testified that he could certainly work simultaneously for XPO and another motor-carrier with his one truck. 1592, 1612-13. When asked on cross examination how he would accomplish this, Decoud methodically explained exactly how he would do this. 1632-35.

[53] Notably, the drivers in *Dial-A-Mattress* were not regulated by the DOT. *Id.* at 890 n. 23. As such, they were not even subject to the complications that DOT regulations create with regard to trip leasing. *See*, *e.g.*, *NAVL*, 869 F. 2d at 604.

The Drivers who contested this point appear to not only rely on statements that were allegedly told to them over seven years ago (an irrelevant time period), but they likely misunderstood what was allegedly told to them. Drivers have always been free to trip lease, but the reality is, legal regulations require drivers and motor carriers to take certain steps to ensure they are trip leasing within the confines of the law. Under 49 CFR 376.12(c)(1), the owner-operator and motor carrier are required to have a lease agreement that provides: "the authorized carrier lessee [XPO] shall have exclusive possession, control, and use of the equipment for the duration of the lease. The lease shall further provide that the authorized carrier lessee shall assume complete responsibility for the operation of the equipment for the duration of the lease."[54] *See also NAVL*, 869 F.2d at 604 (noting that there are regulatory-based limitations to trip-leasing).

The Drivers who contested their ability to trip lease also relied upon alleged assertions that pre-dated the relevant time period. Herrera said that when he first leased his truck to Pacer, he was told by Ezekial Chevez that the truck would be used for "mainly work from Pacer." 123. This allegedly was said back in 2010. 47. Canales also alleged that he was told by Chevez that the truck had to be used for Pacer work. 786-87, 812-13. This alleged comment was also made back in 2010.[55] 785. Lopez likewise alleged that he was previously told he could not use his truck for another carrier. 573-74. This statement also was allegedly made back in 2010. 533-34. Each of these alleged statements pre-dated the relevant time period by five years, and as such, are not entitled to any weight, *see supra*, III(C), since the evidence strongly supports that XPO

[54] 49 CFR 376.12(c)(4) provides: "Nothing in the provisions required by paragraph (c)(1) of this section is intended to affect whether the lessor or driver provided by the lessor is an independent contractor or an employee of the authorized carrier lessee. An independent contractor relationship may exist when a carrier lessee complies with 49 U.S.C. 14102 and attendant administrative requirements."

[55] Canales admitted he never looked into whether he could work for another company. 973.

has permitted trip-leasing during the relevant time period. Avalos similarly asserted he was told that he could not use his truck for outside business; but he did not provide a date estimate for when he was allegedly told this (309-310), and Avalos admitted that he told the NLRB in 2015 that "**If I wanted to work for another employer, I think it would be fine**, but it never happened." 389-90 (emphasis added).

The Drivers clearly have an actual *opportunity* to work for other companies, and it is uncontroverted that several have simultaneously done so within the recent past.

5. The Owner-Operators Invest Enormous Sums Of Money In Their Trucks, Which They Consider Investments.

The Owner-Operators invest enormous sums of money in their equipment and its upkeep. Numerous Owner-Operators testified that they invested over $100,000.00 in the purchase of their trucks alone. Lopez's truck cost $116,000. 540-41. Montenegro purchased two of his trucks for $119,000.00 each. 1457. The Owner-Operators testified that they consider their trucks to be "investments." Montenegro 1457; Decoud 1593-94. Those who do not yet outright own their trucks generally finance their trucks or take part in lease-to-own programs, wherein they make lease payments over several years, and then make a payment at the end of the lease term in order to outright purchase the truck. Lopez 628-29; Gaitan 744-45; Canales 912; Camacho 1133; Trauner 1966-67.[56]

The law is clear that regardless of how the Owner-Operators acquire these massively expensive trucks, their payment towards the trucks — and the payments to maintain the trucks — constitute highly substantial investments. *Yellow Taxi*, 721 F.2d at 380 ("the $202 weekly leasing fee paid to Suburban over 50 working weeks constitutes an annual investment of $10,000, excluding the cost of gasoline. Drivers who make such a sizeable investment are not to

[56] Much like with the acquisition of homes, it is to be expected that trucks costing over $100,000 will typically need to be paid off over time.

be characterized as employees who make no entrepreneurial contribution and take no financial risk in their work. Suburban's lessees clearly work for profits."); *Merchants Home Delivery*, 580 F.2d at 975 ("[A]ll have a substantial investment in their equipment, which is their responsibility to fuel, maintain, insure and generally keep up to Merchants' standards and their own standards."); *Local 777, Seafarers International Union v. NLRB*, 603 F.2d 862, 898 (D.C. Cir. 1978) ("*Seafarers*") ("[O]ver the course of a year, a lessee will invest close to $7,000 in lease payments for the car and additional sums in the necessary gas and oil. This sum of money, paid daily, cannot be considered as anything less than a substantial investment—though the lessee never acquires title to the cab."); *Central Transport,* 299 NLRB at 13 ("The driver signatories owned or leased their own tractors, which involved a substantial investment on their part."); *Austin Tupler Trucking*, 261 NLRB at 185 ("[T]hey exercise entrepreneurial judgment regarding the mechanical specifications of the trucks in which they have a very substantial investment.").

The Owner-Operators' massive investments in their equipment suggest that they operate as independent businesses. *FedEx*, 361 NLRB at 621 ("The independent-business factor encompasses…whether the putative contractor…has proprietary or ownership interest in her work….[and] has control over important business decisions, such as…the purchase and use of equipment; and the commitment of capital."). No evidence in *FedEx* suggested that FedEx drivers invested anywhere close to $100,000+ in their equipment.[57]

[57] The Board has found that the acquisition of trucks costing between $12,000 and $20,000 — a small fraction of the cost of the trucks in the instant case — constituted "substantial" investments. *Central Transport*, 299 NLRB at 6, 13. *See also Roadway*, 326 NLRB at 845 ("The estimated purchase price of these vehicles ranges from $22,000 for the smallest-sized van to $39,000 for the largest-sized van.").

6. The Owner-Operators Invest In Maintenance Of Their Trucks, Which Has Enormous Financial Implications.

The Owner-Operators must also invest in the maintenance of their trucks in order to protect their substantial investment in their equipment. The Owner-Operators are in charge of maintaining and paying for the maintenance of their trucks, and they are free to get maintenance wherever they would like. Lopez 560; Camacho 1265; Flores 1311; Montenegro 1457, 1459-60; Decoud 1600. How well the Owner-Operators maintain their equipment can have a highly significant impact on profits and losses, as conspicuously evidenced at the hearing. *See*, *e.g.*, Montenegro 1456-57. Decoud testified that if major repairs wind up being needed — as compared to routine maintenance — the costs can hover between $3,000 to around $20,000. 1593-94.

Indeed, substantial evidence supported the fact that due to poor maintenance, Avalos' truck engine gave out 200,000 miles before most engines of that type, leading to a maintenance bill between $20,000 and $24,000. *See infra,* III(T). Not only was the bill itself enormous, but the faulty engine prevented Avalos from being able to generate money off his truck until the problem was solved — thus, the maintenance issue resulted in a double loss for Avalos. In assessing whether a worker is functioning as an independent business, the Board must assess whether the worker has "an actual, not merely theoretical, opportunity for gain ***or*** **loss**." *FedEx*, 361 NLRB at 619 (emphasis added.) Such opportunity is manifest here.[58]

Guiding law has long recognized that truck drivers' decisions with respect to maintenance represent a significant entrepreneurial opportunity for profit or loss. *NAVL*, 869 F.2d at 600 ("[T]he drivers assume significant entrepreneurial risks through the control they

[58] The *FedEx* decision makes no mention of the cost of the FedEx drivers' trucks or the costs of any needed maintenance. One assumes the costs were far less significant with respect to FedEx delivery drivers.

exercise over the means and manner of performance; they decide when and how the truck must be maintained or repaired"); *Diamond L. Transp.*, 310 NLRB at 631 ("[T]he owner-operators and drivers assume significant entrepreneurial responsibility in their relationship with the Employer as their income is determined by the number of loads they decide to carry as well as their independent decisions regarding maintenance and repair of their vehicles."); *Precision Bulk Transport*, 279 NLRB at 438 ("The drivers' diligence and efficiency in maintaining and operating their rigs permit them to control their profits and losses within the confines of the lease agreement's financial terms."); *Austin Tupler Trucking*, 261 NLRB at 185 ("They can affect their profit and loss … by the manner in which they maintain their trucks[.]").

7. The Owner-Operators Decide Whether To Operate Multiple Trucks With XPO And How Many Trucks To Operate With XPO.

All Owner-Operators have the right to invest in as many trucks as they like — and a significant number of Owner-Operators have operated numerous trucks at once with Pacer or XPO within the past few years. The testimony on this point was plentiful. Trauner testified that as of the date of the hearing, approximately a dozen Owner-Operators operated multiple trucks with XPO in Commerce. 1953. Del Campo recounted several who operated between four and five trucks with XPO at a single time. 1699. Several of the witnesses themselves operated multiple trucks with XPO at once. Solis currently operates two trucks (2071); Montenegro currently operates three trucks (1452); and Davis currently operates three trucks. 1775.

This ability to operate multiple trucks at once clearly evidences a significant entrepreneurial opportunity for profit or loss. Davis testified that he plans to continue to grow his business by "lather[ing] and repeat[ing]." 1792. As he stated, "so far this model has worked for me and I don't see why it wouldn't moving forward." *Id.* On the other side of the coin is Alva, for whom Avalos used to drive. Alva operated as many as eight trucks at once, and put

just one Driver (including himself) on each truck. Avalos 386-87. (Davis and Montenegro, in contrast, prefer to assign multiple Drivers to a single truck, in order to maximize income.) After Avalos drove for Alva for a few years, Alva's business declared bankruptcy. Avalos 393-94. Clearly, while the operation of multiple trucks works out for some, it did not for Alva. Either way, the facts demonstrate entrepreneurial opportunity for profit or loss.

Guiding law is clear that the foregoing facts regarding the operation of multiple trucks evidence entrepreneurial activity and proprietary interest in the Drivers' work. *Argix Direct,* 343 NLRB at 1020-21 ("the owner-operators have a significant proprietary interest in the instrumentalities of their work" where they were responsible for obtaining vehicles and some of the owner-operators owned multiple vehicles); *Dial-A-Mattress*, 326 NLRB at 892-93 ("Contrary to the Petitioner's contention, Dial does not unilaterally determine the owner-operators' income levels. The owner-operators may and do have more than one vehicle performing deliveries for Dial") ("[T]he multiple truck ownership of several owner-operators suggests that the standard arrangement offered sufficient incentives for them to want to expand their businesses."); *Central Transport*, 299 NLRB at 13 ("The drivers could also enhance their income, like Callahan, by hiring another driver to perform evening work, or like Bryant, to add another tractor or hire another driver to do weekend work. These are indicia of entrepreneurial status.").

8. The Owner-Operators Decide Whether To, And How To, Invest In Recruiting Efforts.

The Owner-Operators also testified that they invest in recruiting efforts. This is an entrepreneurial opportunity all Owner-Operators could avail themselves of, even if only some take advantage of the undisputed right. Montenegro places advertisements in the Los Angeles Times and at truck stops in an effort to identify suitable driver candidates. 1453. He pays

money for these advertisements. *Id.* He interviews his candidates and personally reviews their driving abilities to discern if they satisfy his personal preferences. 1453. Davis likewise recruits candidates weekly by placing advertisements on Craigslist and Indeed; he pays fees for these advertisements, and he finds them to be a "worthwhile investment." 1783-84.[59] Davis actively advertises for drivers who possess HazMat endorsements, as HazMat deliveries generate premium pay. 1786; *see also* Ackling 1552-53.

Those Owner-Operators who testified that they did not hire drivers of their own generally testified that they did not hire drivers out of a fear that they would not take adequate care of their equipment. *See supra*, III(I)(3)(a). However, if they took the time to recruit and identify suitable driver candidates, this concern could realistically fall by the wayside. Regardless, the opportunity to find and hire or engage other drivers will always be there for the taking, as it is an actual, not theoretical, right.

9. The Drivers Invest In Permits And Special Endorsements.

The Drivers also invest in obtaining special endorsements and licenses. Approximately 20-25 Drivers have obtained HazMat endorsements on their licenses, which allow them to make higher-paying hazmat deliveries. Flores 1306; Ackling 1552-53; Trauner 1959-60. Drivers can also invest approximately $1,000 in obtaining an apportion plate, which allows them to make deliveries outside of the state of California. Trauner 1970-72, 2018. Thirty Drivers have these apportion-plate licenses, *id.*, including Decoud, Montenegro, and Ackling, who all testified that they enjoy (and profit off) making such out-of-state deliveries, where they can avoid the Los Angeles traffic and travel longer distances at a time. As Herrera testified regarding lengthier

[59] Solis likewise testified that he finds his own Drivers, although he did not detail these efforts. 2076.

deliveries: "the more miles that you drive, the more money you make." 195. The ability to make these investments and broaden work opportunities are available (*i.e.*, actual) to all the Drivers.

10. Because The Owner-Operators Must Indemnify XPO, They Are Subject To Additional Risk Of Loss.

The Owner-Operators must also indemnify XPO for various damages relating to their work, which clearly constitutes risk of loss, and is distinguishable from an employer-employee relationship. *See* GC Exh. 60 at Sections 6(A)(7), 20; *Dial-A-Mattress*, 326 NLRB at 891.

In *Porter Drywall*, the fact that crew leaders were liable for damages arising out of their work was cited as one reason why the crew leaders rendered services as independent businesses. 362 NLRB No. 6, slip op. at 5. *See also Merchants Home Delivery*, 580 F.2d at 975 ("Also, the risk of loss is placed squarely on the shoulders of the owner-operators, who must indemnify Merchants for lost or damaged merchandise"); *Argix Direct*, 343 NLRB at 1021 ("owner-operators bear the risk of loss when they (or their drivers) damage customers' merchandise").

11. The Drivers Take Advantage Of Their Negotiating Abilities.

The fact that XPO might have greater bargaining power in negotiations with Drivers is of little if any import in this analysis. "[T]he Board does not, and cannot, define the difference between employees and independent contractors by reference to differences in bargaining power." *St. Joseph News-Press*, 345 NLRB at 481. *See Central Transport*, 299 NLRB at 13 ("the unequal bargaining power as between the Company and the drivers is immaterial"). *See also Crew One Prods., Inc. v. NLRB,* 811 F.3d 1305, 1313 (11th Cir. 2016) (if a "company sets the standardized [contract] terms and in some instances unilaterally changes them, even if true, [that] is indicative only of relative bargaining power, not an employee-employer relationship."); *FedEx Home Delivery v. N.L.R.B.*, 563 F.3d 492, 502 n.8 (D.C. Cir. 2009) ("[W]e will draw no inference of employment status from merely the economic controls which many corporations are

able to exercise over independent contractors with whom they contract."); *Argix Direct*, 343 NLRB at 1017 (drivers presented with "take it or leave it" contracts found to be independent contractors); *Central Transport*, 299 NLRB at 6 (same); *Menard*, 2017 WL 5564295 ("As the Board has observed, in both employer-employee relationships and independent-contractor relationships the relative bargaining strength of the parties has a significant impact on each side's ability to dictate terms…It is not surprising that a large [company] would either use its relative bargaining strength or standardize the delivery service contracts across its operations. The fact that it does these things is not…inconsistent with the haulers operating as independent contractors.").

Even if XPO has greater bargaining power, it cannot be said that the Drivers have not — both individually and collectively — affected the terms of their ICOCs and their payment terms. For one, it was undisputed that many of the Drivers engaged attorneys to negotiate the terms of the ICOC, and the ICOC was in fact changed as a result of those negotiations. Canales 1000-01; Camacho 1165-69; Trauner 1982-83. No similar evidence was present in *FedEx*. Camacho also testified that as a result of concerns raised by the Drivers, changes were made to the payment terms in the ICOCs. 1182-83.

It was also undisputed that Drivers have negotiated for higher rates to deliver more urgent or undesirable loads within the past few years. Rodriguez 1651; Del Campo 1702-05. Indeed, the ICOCs expressly acknowledge and contemplate that Drivers can negotiate either temporary or ongoing changes in payment terms. GC Exh. 60 at Schedule B at Section 2: "Changes In Fees."[60]

[60] *See also* GC Exh. 57 (ICHA) at Exhibit C ("Carrier and you may also agree to spot pricing for a particular shipment that differs from the standard point-to-point or mileage basis").

In *Dial-A-Mattress*, the Board credited the fact that the drivers had the freedom to negotiate more favorable contract terms, even though the evidence established that only three drivers had ever done so. 326 NLRB at 889, 891-92. S*ee also Porter Drywall,* 362 NLRB No. 6, slip op. at 2, 5 (finding crew leaders to function like independent businesses even where forced to accept standardized rates that had been negotiated in "very limited situations").

Further, as already briefed above, Second-Seat Drivers engage in their own negotiations with their Owner-Operators, without XPO's involvement. These negotiations result in more favorable financial terms for some Second-Seat Drivers as compared to others, as the Owner-Operators and Second-Seat Drivers can reach whatever agreement they want regarding work or payment terms. *See*, *e.g.*, Avalos 384, 391-92.

12. The Drivers Function In The Corporate Form And Complete Taxes Like Independent Businesses.

The Drivers complete their taxes like independent businessmen, and many of them function in the corporate form. In Commerce, there are approximately 15 Owner-Operators who perform services under their own corporate names, including Dako Trucking, Inc., Pure Life Logistics, and Noah's Trucking. Del Campo 1701-02; Trauner 1958-59. For these Owner-Operators, XPO makes payment to, and contracts with, the corporation, not the individual owner of the company. *Id.*

Davis, who operates as Davis Logistics, Inc., shed light on what it means to function in the corporate form. Davis Logistics, Inc. has its own independent-contractor agreement for its Second-Seat Drivers (1775, Respondent's Exh. 32), and Davis Logistics, Inc. makes payments to its Drivers directly. 1780-81, Respondent's Exh. 33. Davis created Davis Logistics as an LLC in 2015 in order to capitalize on tax benefits and limit financial exposure; he invested a fee to create the company. 1775-76. As Davis started making more money, he decided it would be

prudent to transition his company to a Schedule C corporation, in order to better protect his assets and receive more favorable tax treatment. 1776-77.

The Drivers' ability to perform work for XPO in the corporate form — which many in fact do — evidences that they are rendering services as independent businesses. *Argix Direct*, 343 NLRB at 1020 ("some of the owner-operators are entrepreneurs who have their own independent companies, several of which are incorporated"); *Dial-A-Mattress*, 326 NLRB at 891 ("The owner-operators have a separate identity from Dial that suggests independent contractor status… [S]everal of them function in the corporate form.").

13. There Is Great Disparity In Pay Between The Highest And Lowest Earners.

The evidence at the hearing indicated that the Drivers' gross payments vary considerably, dependent upon a wide variety of factors. The highest-earning Driver last year earned over $500,000; on the other end of the spectrum are Drivers who earn $25,000 or less. Trauner 1959-60. In between those extremes are Drivers like Mike Ackling, who made over $90,000 last year after his expenses. Ackling 1561. In *Argix Direct*, the Board found it relevant that the owner-operators' gross payments "var[ied] greatly…from a low of $42,911.68 to a high of $92, 129.77." 343 NLRB at 1021.

14. *FedEx* Should Not Be Misunderstood With Regard To The Independent-Business Factor.

FedEx should not be misunderstood with respect to the independent-business factor. The Board clarified in *FedEx* that it would regard entrepreneurial opportunity as "an actual, not merely theoretical, opportunity for gain or loss." *FedEx*, 361 NLRB at 619.[61] In this vein, the

[61] "[I]t is the worker's retention of the right to engage in entrepreneurial activity rather than his regular exercise of that right that is most relevant for the purpose of determining whether he is an independent contractor." *FedEx Home Delivery v. N.L.R.B.*, 563 F.3d 492, 502 (D.C. Cir. 2009)

Board asserted it would "consider evidence…that the employer has effectively imposed constraints on an individual's ability to render services as part of an independent business." *Id.* at 621.

In *FedEx*, the Board's new clarification as to what constitutes "entrepreneurial opportunity" was applied to the FedEx drivers' alleged ability to sell their routes. In *FedEx*, the Board found that this alleged entrepreneurial opportunity was more theoretical than actual. *Id.* at 624. The Board did not come to this conclusion, however, simply by assessing *how many* FedEx drivers ever sold a route. The Board ultimately determined this entrepreneurial opportunity was more theoretical than actual because:

- The Company imposed considerable constraints on the drivers' ability to sell their routes;
- Only two route sales had ever occurred since the terminal opened in 2000 — and thus, it was unclear whether a route sale had even occurred during the time period relevant to assessing independent-contractor status; and
- The act of selling a route had little actual relevance to the drivers in the proposed bargaining unit: "As FedEx acknowledges in its brief, multiple-route drivers are expressly excluded from the petitioned-for unit. Finally, the actual exercise of the opportunity to sell her route takes a single-route driver out of the unit because the sale ends the driver's relationship with FedEx. ***The ability to sell a route, then, has limited bearing on the status of drivers who remain in the unit. It is not an incident of their ongoing relationship with FedEx, but an aspect of its severance***." (emphasis added).

(internal quotation marks omitted). "[T]he failure to take advantage of an opportunity is beside the point." *Id.*

Id. at 624. In short, it would be error to disregard any of the above evidence of entrepreneurial activity simply by assessing *how many* Drivers took full advantage of the opportunity.[62] The question, instead, is as follows: is the *opportunity* to take advantage of the activity more actual, or is it more theoretical? If the latter, are constraints on the activity being imposed by the putative employer (as in *FedEx*), or do the constraints instead derive from a different source (e.g., legal regulations)?

It simply cannot be disputed that all of the Drivers have the ability to take advantage of the above entrepreneurial activities, if they so choose. They can all go out and find their own workers; they can all acquire multiple trucks; they can all establish corporate names for their businesses and take advantage of the corresponding business advantages; they can all decide what work they will accept from XPO and what days and times they will work for XPO; they can all decide what endorsements and licenses to invest in; they can all decide to perform services for other companies; and they can all decide where and how to maintain their vehicles and where to acquire their vehicles. None of this can be credibly disputed, and the foregoing indicia of entrepreneurial activity are completely distinguishable from the route-sales at issue in *FedEx*.

J. The Drivers Are Engaged In A Distinct Occupation/Business.

Related to the above, it is evident that the Drivers are engaged in a distinct business. The circumstances here are in stark contrast to *Green Fleet*, where Judge Wedekind found the drivers were not engaged in a distinct business because there was "no evidence that ***any*** of the lease drivers actually incorporated, hired any employees, or performed work for any other company." 2015 WL 1619964 (emphasis added). Moreover, unlike in *Green Fleet* and many other Board

[62] In *Menard*, evidence showed that 6 drivers, across 300 of the Company's stores, had performed work for other clients. 2017 WL 5564295. Judge Pogas determined that these 6 examples "show[ed] that the actual entrepreneurial *opportunity* for such work exists, regardless of whether other contractors exploit that opportunity." *Id.* (emphasis in original).

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Division of Judges

XPO CARTAGE, INC.

and

INTERNATIONAL BROTHERHOOD OF TEAMSTERS

Cases 21-CA-150873
21-CA-164483
21-CA-175414
21-CA-192602

To the Honorable Christine E. Dibble,
Administrative Law Judge

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characterizing them as independent contractors. Similarly, here, the drivers had no realistic opportunity to negotiate this term.

j) Respondent and the Drivers are Engaged in the Same Business.

Respondent's core business, as noted above, is to provide drayage services through the movement of containers by truck for its customers. Inasmuch as the drivers are engaged to perform these drayage services, they are engaged in the same business, and the drivers do not perform a function ancillary to Respondent's business.

3. The Drivers Do Not Render Services As Independent Businesses and Have No Significant Entrepreneurial Opportunity.

In addition to the ten common-law factors, in Fedex Home Delivery, *supra*, the Board announced that it would also consider, as a separate factor, whether the worker at issue renders service as an independent business, usually interpreted as having the actual entrepreneurial opportunity for gain or loss. Fedex Home Delivery, *supra* at 624. In evaluating entrepreneurial opportunity, the Board emphasized that only actual, as opposed to theoretical, opportunity supports a finding of independent contractor status. The Board held that, in considering if true entrepreneurial opportunity existed, it would consider whether the worker had a "realistic ability to work for other companies," a "proprietary or ownership interest" in the work, and "control over important business decisions," including the extent to which the putative employer "has effectively imposed constraints on an individual's ability to render services as part of an independent business." Fedex Home Delivery, *supra* at 621. Therefore, opportunities that are

"circumscribed or effectively blocked by the employer" are not considered actual opportunities. Fedex Home Delivery, *supra* at 619. In addition, "if the day-to-day work of most individuals in the unit does not have an entrepreneurial dimension, the mere fact that their contract with the employer would permit activity that might be deemed entrepreneurial is not sufficient to deny them classification as statutory employees." Fedex Home Delivery, *supra* at 620.

Here, Respondent's drivers lack any meaningful entrepreneurial opportunity by virtue of the fact that until the end of 2016, Respondent, not the drivers, owned the tractors, chassis and containers. While since December 31, 2016, the drivers, not Respondent, own the tractors, Respondent still owns the chassis and containers. More importantly, Respondent has always controlled the drivers' use of the trucks, as well as most other aspects of their work, including dispatch, insurance, customer contracts, and the method and amount of compensation. Respondent's drivers have no significant proprietary interest in the work they perform.

Although Respondent may argue that the drivers can theoretically use the trucks to work for other companies, as the current hauling agreements expressly allow, this is merely a theoretical possibility. The record contains no evidence that any driver has ever done so at the same time and with the same trucks used to haul containers for Respondent. As previously noted, the Board, in determining employee status, ignores a theoretical right to work for others where the evidence demonstrates that the relationship between the parties creates obstacles to pursuing additional work. Roadway Package System, Inc. *supra* at 851.

Even if an opportunity to perform additional work was more than theoretical, the Board has further noted that opportunities that are "circumscribed or effectively blocked by the employer" are not actual opportunities. Fedex Home Delivery, *supra* at 621. Not only would the drivers have to cover the placards with Respondent's name and permit numbers that are glued to the doors, the drivers could not use Respondent's permits and operating authority, or its insurance. These restrictions, in conjunction with the government limitations on their hours of work, effectively prohibit them from working for anyone besides Respondent. See Os Transportation, LLC, *supra* at 1063. In that case, it was noted that the long hours the drivers worked effectively precluded them from working for other carriers. Similarly here, almost all of the drivers, with the exception of Driver Decoud, worked full-time, Monday through Friday, for Respondent.

Even within the confines of their work for Respondent, the drivers have little opportunity to increase their income which could only be accomplished by trying to work more hours. While some of the drivers suggested that they can increase their income by working more efficiently,[56] as the Board recently noted: "the choice to work more hours or faster does not turn an employee into an independent contractor." Lancaster Symphony Orchestra, 357 NLRB 1761, 1765 (2011).

The drivers have no control over the important business decisions. Respondent completely controls its business strategy, its customers and the rates it charges its customers. The drivers cannot negotiate movement rates with Respondent's customers or even obtain work from Respondent's customers without going through dispatch. Nor

[56] Driver Decoud testified that many factor affected how much he earned including the number of days he worked, the kinds of loads he transported, how well a truck is maintained, and the cost of fuel. (Tr. 1593-1595).

are the drivers permitted to contact customers, even to report traffic issues or to change appointments. Moreover, there is no evidence in the record that any of the drivers advertise their services as truck drivers to work at other companies or have their own business cards promoting their service in the drayage industry. Rather, the drivers consistently testified that they do not work for anyone other than Respondent, and solely do business with Respondent's customers in the name of Respondent.

The terms and conditions of the drivers' work are exclusively determined by Respondent. When examining entrepreneurial control, the Board will consider whether a worker's terms and conditions of work are promulgated and changed unilaterally by the company. In this regard, the Board considers it significant when a company unilaterally drafts, promulgates and changes lease agreements. Stamford Taxi, Inc., 332 NLRB 1372, 1373 (2000). That's exactly what Respondent did here.

Respondent first had drivers execute leases and hauling agreements in 2010 when its predecessor acquired trucks. In 2016, well after the Union campaign began and drivers filed claims that they were misclassified, Respondent unilaterally decided to modify the terms of the hauling agreements and demanded that the drivers sign the new ones it had created. The new hauling agreements purport to make it appear that the drivers are independent contractors. The agreements even labeled them as "owners" of the trucks although none of the drivers, who comprised the overwhelming majority of the drivers in March 2016, actually owned a truck at that time. Notably, the new agreements, unlike the 2010 agreements, describe the drivers as an "independent business enterprise," and state that the Hauling Agreement is between "two co-equal

independent business enterprises that are separately owned and operated."[57] The 2016 agreement, unlike the 2010 hauling agreement, also contains a separate schedule that the drivers were required to separately sign, acknowledging the drivers' status as independent contractors. In addition, the new agreements, unlike the prior agreement, contain separate schedules that the drivers were also required to separately sign, explaining how the trucks could be employed for "alternative uses."[58]

The hauling agreements purport to give drivers the right to hire others to drive their trucks. However, Respondent severely restricts the truck owner's right to do so. Not only must the driver an owner wants to hire submit an application to work for Respondent, be interviewed by Respondent's recruiter, and satisfy Respondent's other qualifications, but Respondent has the unfettered right to reject someone the owner chooses who meets Respondent's stated qualifications. Humberto Canales is the perfect example because he clearly satisfied Respondent's qualifications, having worked for Respondent for years, and left of his own volition in 2016. Javier Solis testified that he explained to Respondent's recruiter that he wanted to hire Canales as a second seat driver. Nevertheless, despite language in the hauling agreement permitting a driver to hire others, Respondent refused to permit Solis to hire Canales to drive a truck for Respondent.

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[57] GC X at § 4.

[58] Respondent may assert that the drivers had the ability to negotiate the terms of the 2016 hauling agreement because Respondent permitted drivers to opt out of the mandatory arbitration provision. However, in that isolated circumstance, the drivers were represented by an attorney who was able to negotiate that one change. Otherwise, there is no evidence that Respondent was willing to negotiate terms of the hauling agreement, despite the drivers' complaints about having to sign new hauling agreements. Indeed, approximately 20 drivers left rather than sign new hauling agreements. (Tr. 1167).

Similarly, the new hauling agreements purport to give drivers the right to accept or decline any work Respondent offers without any adverse consequences. Although the 2010 agreement gave drivers the right to reject work, the new agreement added that there would be no adverse consequences for doing so. Nevertheless, the record consistently establishes that this provision, like many others, is entirely illusory and does not accurately reflect the actual terms and conditions of the drivers' work. As explained above, the drivers rarely reject work, and there was some testimony that they would suffer, if they did. Moreover, one of the reasons Humberto Canales was not rehired was because he rejected loads.

In short, the evidence in the record establishes that the drivers do not render services as independent businesses. Based on the foregoing, and the record as a whole, Respondent has failed to meet its burden of establishing that the drivers are independent contractors and, therefore, the drivers must be classified as employees within the meaning of the Act.

4. The D.C. Circuit Fedex Decisions Do Not Require a Contrary Result

As an initial matter, the Board has recently issued decisions reaffirming the analytical framework adopted in Fedex Home Delivery, *supra*. In Sisters' Camelot, *supra*, the Board applied the same analysis to canvassers, in Porter Drywall, Inc., 362 NLRB No. 6 (January 29, 2015) to crew leaders, and in Pennsylvania Interscholastic Athletic Association, Inc., 365 NLRB No. 107 (July 11, 2017) to lacrosse officials. However, in Fedex Home Delivery v. NLRB., 563 F. 23 492 (D.C. Cir. 2009)(FedEx I) and Fedex Home Delivery v. NLRB., 849 F. 3d 1123 (D.C. Cir. 2017)(FedEx II), the D.C. Circuit Court of Appeals rejected the Board's reliance in Fedex Home Delivery,